Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	IB Docket No. 95-59
Preemption of Local Zoning Regulation	)	DA 91-577
of Satellite Earth Stations	)	45-DSS-MISC-93
	)	

To: The Commission

PETITION FOR RECONSIDERATION OF THE NATIONAL LEAGUE OF CITIES; THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS; THE NATIONAL TRUST FOR HISTORIC PRESERVATION; LEAGUE OF ARIZONA CITIES AND TOWNS; LEAGUE OF CALIFORNIA CITIES; COLORADO MUNICIPAL LEAGUE; CONNECTICUT CONFERENCE OF MUNICIPALITIES; DELAWARE LEAGUE OF LOCAL GOVERNMENTS; FLORIDA LEAGUE OF CITIES; GEORGIA MUNICIPAL ASSOCIATION; ASSOCIATION OF IDAHO CITIES; ILLINOIS MUNICIPAL LEAGUE; INDIANA ASSOCIATION OF CITIES AND TOWNS; IOWA LEAGUE OF CITIES; LEAGUE OF KANSAS MUNICIPALITIES; KENTUCKY LEAGUE OF CITIES; MAINE MUNICIPAL ASSOCIATION; MICHIGAN MUNICIPAL LEAGUE; LEAGUE OF MINNESOTA CITIES; MISSISSIPPI MUNICIPAL ASSOCIATION; LEAGUE OF NEBRASKA MUNICIPALITIES; NEW HAMPSHIRE MUNICIPAL ASSOCIATION; NEW JERSEY STATE LEAGUE OF MUNICIPALITIES; NEW MEXICO MUNICIPAL LEAGUE; NEW YORK STATE CONFERENCE OF MAYORS AND MUNICIPAL OFFICIALS; NORTH CAROLINA LEAGUE OF MUNICIPALITIES; NORTH DAKOTA LEAGUE OF CITIES; OHIO MUNICIPAL LEAGUE; OKLAHOMA MUNICIPAL LEAGUE; LEAGUE OF OREGON CITIES; PENNSYLVANIA LEAGUE OF CITIES AND MUNICIPALITIES; MUNICIPAL ASSOCIATION OF SOUTH CAROLINA; TEXAS MUNICIPAL LEAGUE; VERMONT LEAGUE OF CITIES AND TOWNS; VIRGINIA MUNICIPAL LEAGUE; ASSOCIATION OF WASHINGTON CITIES; AND WYOMING ASSOCIATION OF MUNICIPALITIES.

Tillman L. Lay
J. Darrell Peterson
MILLER, CANFIELD, PADDOCK
AND STONE, P.L.C.
1225 19th Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 785-0600

Their Attorneys

April 17, 1996

TABLE OF CONTENTS

Attachments:

Summary

The Local Communities petition the Commission to reconsider rule revised rule at 47 C.F.R. § 25.104 regarding the preemption the Commission of local zoning and other regulations relating to satellite earth stations ("Preemption Rule"). The Preemption Rule is breathtaking in scope -- immediately invalidating all state and local "zoning, land use, building, or similar regulation[s]" that in any way "affect" certain small satellite dishes. This represents an unprecedented federal intrusion into state and local authority in areas that are traditionally within the province of state and local governments and about which the federal government has little to no expertise. Moreover, the Commission's mechanism for overcoming the preemption requires the Commission to exercise local police power.

The Preemption Rule is contrary to the language and legislative history of Section 207 of the 1996 Telecommunications Act. Section 207 only authorizes the Commission to adopt regulations prohibiting state and local regulations that "impair" a viewer's ability to receive DBS service. By "impair," Congress meant "prevent." By its terms, Section 207 does not contemplate any satellite service other than DBS; it does not encompass VSATs, FSS, or C-Band antenna. Nor does the Commission's preexisting general authority save the Preemption Rule. The Order's reading of such authority would render Sections 207 completely superfluous, and ignores the language and legislative history of Sections 207 and 704 of the 1996 Act. The Preemption Rule is also impermissibly broader in scope than the anti-discrimination rule adopted under the FCC's former authority.

The Preemption Rule unconstitutionally exceeds the limits of the Commerce Clause. Congress may only regulate activities that "substantially affect" interstate commerce, and it cannot use the Commerce Clause to exercise general police powers of the sort retained by the states. The Preemption Rule goes beyond the Commerce Clause because it preempts all local zoning, land use, building and similar regulations that merely "affect" small satellite antenna, regardless whether the regulations "impair" DBS service or whether they "substantially affect" interstate commerce.

By immediately voiding any regulation that "affects" smaller dishes, the Preemption Rule necessarily voids what the Commission concedes are legitimate health and safety laws, elevating satellite service above public health and safety. And the rule sanctions the immediate blighting of thousands of historic districts and scenic areas across the nation.

The record provides no justification for the sweeping nature of the Preemption Rule. Rather, the Commission concedes that the evidence of restrictive local regulations is at best anecdotal. In light of the facts that there are over 38,000 local jurisdictions nationwide and that DBS service has enjoyed unprecedented rapid growth, basing a rule on anecdotal evidence alone is arbitrary and capricious. The only rule supported by the record is one that merely prohibits restrictions that impair reception of service, and allows parties to petition the Commission to preempt particular regulations based on a showing of impairment.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	IB Docket No. 95-59
Preemption of Local Zoning Regulation	)	DA 91-577
of Satellite Earth Stations	)	45-DSS-MISC-93
	)	

To: The Commission

PETITION FOR RECONSIDERATION

Pursuant to 47 C.F.R. § 1.429, the Local Communities[1] hereby petition the Commission to reconsider its revised rule at 47 C.F.R. § 25.104 regarding the preemption of local zoning and other regulations relating to satellite earth stations ("Preemption Rule"), as adopted in the Report and Order and Further Notice of Proposed Rulemaking, IB Docket No. 95-59, DA 91-577, 45-DSS-MISC-93, adopted February 29, 1996, and published in the Federal Register on March 18, 1996.[2]

---

[1] The Local Communities is a coalition consisting of the National League of Cities, the National Association of Telecommunications Advisors and Officers; The Natural Trust for Historic Preservation; League of Arizona Cities and Towns; League of California Cities; Colorado Municipal League; Connecticut Conference of Municipalities; Delaware League of Local Governments; Florida League of Cities; Georgia Municipal Association; Association of Idaho Cities; Illinois Municipal League; Indiana Association of Cities and Towns; Iowa League of Cities; League of Kansas Municipalities; Kentucky League of Cities; Maine Municipal Association; Michigan Municipal League; League of Minnesota Cities; Mississippi Municipal Association; League of Nebraska Municipalities; New Hampshire Municipal Association; New Jersey State League of Municipalities; New Mexico Municipal League; New York State Conference of Mayors and Municipal Officials; North Carolina League of Municipalities; North Dakota League of Cities; Ohio Municipal League; Oklahoma Municipal League; League of Oregon Cities; Pennsylvania League of Cities and Municipalities; Municipal Association of South Carolina; Texas Municipal League; Vermont League of Cities and Towns; Virginia Municipal League; Association of Washington Cities; and Wyoming Association of Municipalities.

[2] That portion of the Report and Order and Further Notice of Proposed Rulemaking that promulgates the Preemption Rule will be referred to as the "Order," while the rulemaking portion will be referred to as the "FNRPM".

I. The Commission Has Misconstrued the Meaning and Effect of Section 207 of the Telecommunications Act of 1996.

A. The Commission's Preemption Rule Rests on an Improper Construction of Section 207.

In Section 207 of the Telecommunications Act of 1996, "Restrictions on Over-the-Air Reception of Devices," Congress directed the Commission to adopt regulations "to prohibit restrictions that impair a viewer's ability to receive video programming services through devices designed for over-the-air reception of television broadcast signals, multichannel multipoint distribution service, or direct broadcast satellite services."[3] (Emphasis added.) In discussing this Section as it appeared in House Bill H.R. 1555,[4] the House Report stated:

> The Committee intends this section to preempt enforcement of State or local statutes and regulations, State or local legal requirements, or restrictive covenants or encumbrances that prevent the use of antennae designed for off-the-air reception of television broadcast signals or of satellite receivers designed for receipt of DBS services. Existing regulations, including but not limited to, zoning laws, ordinances, restrictive covenants or homeowners' association rules shall be unenforceable to the extent contrary to this section."[5]

The Report went on to note that "'Direct Broadcast Satellite Services' is a specific service that is limited to higher power DBS satellites," and that "this section does not prevent the enforcement of State or local . . . regulations . . . that limit the use and placement of C-Band satellite dishes."[6]

---

[3] Section 207, Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 114 (1996) ("Telecom Act").

[4] Senate Bill 652 did not have a corresponding provision.

[5] H.R. Rep. No. 104-204, 104th Cong., 1st Sess. at 123-24 (1996) ("House Report") (emphasis added).

[6] Id. at 124 (emphasis added).

Thus, Section 207 only authorizes the Commission to promulgate regulations to prohibit restrictions that impair a viewer's ability to receive DBS services. It denies the Commission authority to preempt restrictions that impair reception of any other type of satellite service.[7] And the legislative history of Section 207 makes clear that by "impair," Congress meant "prevent."[8]

The Preemption Rule, however, goes far beyond Congress' intent. This is true even if one assumes, contrary to the language of the House Report, that Congress' use of the word "impair" means something less than "prevent". Whatever the word "impair" means, it is irrational to conclude, particularly on the record before the Commission, that any state or local regulation that "affects" satellite dishes necessarily "impairs" a viewer's ability to receive DBS service. Yet Subsection (b)(1) of the Preemption Rule preempts all state and local regulations that merely "affect[]" the installation, maintenance or use of dishes of two or one meters or less, respectively, regardless whether they "impair" reception of DBS service. Such a broad preemption is flatly inconsistent both with the language and legislative history of Section 207 and is thus contrary to law.[9]

---

[7] This conclusion is underscored by the Conference Report's discussion of Section 704 of the Act, where the Conferees made clear their general intent that the FCC not interfere with local zoning authority. H.R. Conf. Rep. No. 104-458, 104th Cong., 1st Sess. 207-09 (1996).

[8] House Report at 124.

[9] See Louisiana Public Service Commission v. F.C.C., 476 U. S. 355, 374, 106 S.Ct. 1890, 1901 (1986) ("a federal agency may preempt state law only when and if it is acting within the scope of its congressionally delegated authority").

The Order offers no reasoned explanation for its departure from the plain language and legislative history of Section 207.[10] Nowhere does the Order explain, for instance, the basis for its conclusion that any regulation "affect[ing]" small satellite dishes necessarily "impairs" service. To the contrary, the Order concedes (at ¶ 14) that there are "four million satellite earth stations in use" and that "evidence [of impairment] relates to only a small percentage of [the thousands of local jurisdictions nationwide]" (at ¶ 23).

The Order's fatal flaws are not rehabilitated by paying lip service to the "accommodation of local concerns" via a "rebuttable presumption."[11] To the contrary, the standards for rebutting the presumption merely underscore the Preemption Rule's flaws, for those standards are completely unrelated to the statutory standard of "impairment."

The Preemption Rule does not allow a local government to rebut the presumption by showing as a factual matter that a particular regulation does not "impair" viewers' ability to receive DBS service. To the contrary, the issue of impairment is apparently irrelevant to rebutting the presumption. Instead, the state or local government must show that the regulation is necessary to accomplish a clearly defined health or safety objective that is stated in the

---

[10] Particularly revealing is the stark contrast between the broad "affects" language in subsection (b)(1) of the Preemption Rule, and the language of the rule proposed in the FNPRM (at ¶ 62) concerning nongovernmental restrictions. The proposed rule preempts only those restrictions "to the extent that [they] impair a viewer's ability to receive" service. Yet Section 207 draws no such distinction between governmental and non-governmental restrictions.

[11] FNPRM at ¶ 59. Subsection (b)(1) concerning regulation of small dishes is not a "rebuttable presumption" at all, but a conclusive presumption that immediately renders a regulation unenforceable until a local government successfully petitions the FCC. The provision effectively wipes out literally thousands of local laws overnight.

regulation, or in the case of a waiver, addresses "peculiar or unique situations" such as "genuine historic districts, waterfront property, or environmentally sensitive areas."[12]

Thus, under the Preemption Rule, a regulation "affecting" DBS dishes is unenforceable regardless whether the local government or interested party could show that it does not "impair" service at all. And conversely, if a local regulation satisfies the health, safety, or aesthetic criteria, it will not be preempted, irrespective of whether it impairs the viewer's ability to receive DBS programming. This structure cannot be squared with the language of Section 207.

B. The Preemption Rule Improperly Embraces C-Band and VSAT Satellite Antennas That are Explicitly Excluded from the Purview of Section 207.

Section 207 only authorizes the FCC to promulgate regulations preempting state or local regulations that prevent the use of "satellite receivers designed for receipt of DBS." House Report at 124. And by its terms, Section 207 does not apply to C-Band satellite earth stations, FSS antennas, or to transmitting satellite antennas, such as VSAT antennas.

On its face, this Preemption Rule far exceeds the permissible parameters for preemption established by Congress in Section 207. Section (a) of the Preemption Rule clearly embraces VSAT and transmitting satellite antennas as well as C-Band satellite antennae, both of which are excluded from Section 207 by its terms -- and the latter of which is explicitly excluded from Section 207 both by the terms of Section 207 and the unequivocal language in the legislative history. Hence, to the extent that Section (a) of the Preemption Rule contemplates any satellite

[12] Order at ¶ 51.

antennas other than those used to receive DBS service, it improperly exceeds the authority granted to the Commission in Section 207.

Section (b) of the Preemption Rule suffers from the same defects. Thus, Section 207 provides no basis for the part of Section (b)(1)(A) concerning dishes of two meters or less in diameter in commercial areas to the extent such dishes are not used for reception of DBS service. Similarly, the treatment of one meter satellite antennas as a class in Section (b)(1)(B) is impermissibly overbroad, since Section 207 speaks not in terms of the size of the antenna, but in terms of the purpose for which the antenna in question was designed. Consequently, since antennas used for reception of DBS service are invariably smaller than one meter in diameter (as the FNPRM itself acknowledges at ¶ 60), the Preemption Rule is too broad. On these grounds alone, the FCC must narrow the scope of the Preemption Rule to bring it into conformity with Section 207.

C. Contrary to the Order, Section 207 Effectively Prohibits FCC Preemption of Any Local Zoning Regulations Other than those Relating to DBS, MMDS, and Television Broadcast Reception.

Recognizing that Section 207 gives the Commission no authority over VSAT, C-Band or FSS dishes, the Order tries to sidestep the problem by claiming that Section 207 does not affect the FCC's preexisting authority to preempt state and local zoning regulations "that burden a user's right to receive all satellite-delivered video programming (not just the subset specifically singled out by Congress in Section 207) or that inhibit the use of transmitting antennas." Order at ¶ 16; see also id. at ¶ 61.

The problem with this logic is that it proves to much: it would mean that Section 207 is superfluous, since the Commission could have done the same thing if Section 207 never existed.[13] It is a basic cannon of statutory construction that statutes should be construed to give effect to every clause and word, so far as possible.[14]

Section 207 restrictively grants to the Commission authority to preempt only those local laws impairing reception of DBS, MMDS and off-air broadcast television services. If, as the Order suggests, the Commission already had preexisting authority to preempt local regulations that burden a user's right to receive not only the services covered by Section 207, but also other forms of satellite or television reception, then the only plausible reading of Section 207 is that it stands as a limitation on that preexisting authority. This is true particularly in light of Congress' specifically expressed intent in Section 704 to preserve local zoning authority. To read Section 207 otherwise would "emasculate the entire section."[15]

---

[13] The Order's logic is flawed in three other respects as well: First, the earlier 1986 preemption rule on which the Order relies was much less intrusive, prohibiting only discrimination against satellite dishes. Second, the House Report explicitly states that local regulation of C-Band is not to be interfered with, and that Section 207 reaches only DBS service. Third, the Order completely overlooks Section 704 of the Telecom Act, which states that "Nothing in [the Communications] Act [of 1934, as amended] shall limit or affect the authority of a State or local government . . . over decisions regarding the placement, construction, and modification" of wireless facilities except as provided in Section 704.

[14] See, e.g., United States v. Menasche, 348 U.S. 528, 538-39, 75 S.Ct. 513, 520 (1955).

[15] Menasche, 348 U.S. at 538-39. The Order's effort to extend the Preemption Rule's reach to VSAT receiving and transmitting equipment suffers from another defect as well. Unlike the services listed in Section 207, VSAT is not a video entertainment service. Rather, it is a wireless telecommunications service. As such, Section 704 of the Telecom Act bars the Commission from preempting any local zoning regulation of VSAT facilities except on the grounds of radio frequency emissions.

D. The Preemption Rule Represents an Unconstitutional Usurpation of Local Police Power Unjustified by the Commerce Clause.

The Preemption Rule represents a truly sweeping, unprecedented -- and we believe, constitutionally impermissible -- usurpation by the federal government of local police power regulation that courts have long recognized as resting at the core of the powers reserved to the state and local governments. We do not question that the Commerce Clause empowers the federal government to preempt a state or local law that actually "impairs" reception of DBS service (although we question the wisdom of exercising such power).[16] We also agree that FCC regulations have no less preemptive effect than statutes, provided that they fall within the powers granted by the authorizing statute.[17] But the authority of Congress or the FCC to preempt state and local laws is not unbounded. Rather, it is tempered by, among other things, the Tenth Amendment[18] and, as the Supreme Court recently reaffirmed, the limits of the Commerce Clause itself. And the Preemption Rule falls outside of those boundaries.

In United States v. Lopez, 115 S.Ct. 1624, 1629-30 (1995), the Supreme Court held that the Commerce Clause allows Congress to regulate only where the regulated activity "substantially affects" interstate commerce. The Court went on to hold that in order to determine whether a sufficient nexus exists between interstate commerce and the regulated activity, it was unwilling to make several inferences in a manner that would convert Congress'

---

[16] See, e.g., Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 698-99, 104 S.Ct. 2694, 2700 (1984).

[17] Id. (citing Fidelity Federal Savings & Loan Assn. v. De la Cuesta, 458 U.S. 141, 102 S.Ct. 3014 (1982) (citations omitted)).

[18] U.S. Const., Amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

Commerce Clause authority into a general police power of the sort retained by the states. 115 S.Ct. at 1630. The Court refused to go that far since, as pointed out by Justice Thomas, the Court "always [has] rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise police power." 115 S.Ct. at 1642 (emphasis in original). (Thomas, J., concurring).

Yet the Preemption Rule would unquestionably authorize the FCC to exercise such police power. As the Supreme Court has repeatedly recognized, "regulation of land use is a function traditionally performed by local governments."[19] Indeed, zoning and land use regulation "is perhaps the quintessential state activity."[20]

Thus, like the statute at issue in Lopez, the Preemption Rule intrudes into an area -- "local zoning, land use, building or similar regulations" -- that is clearly at the heart of local police power. And also like the statute in Lopez, the Preemption Rule impermissibly steps beyond the scope of the Commerce Clause. The reason is that the Rule preempts all local zoning and land use regulations that "affect" the installation or use of small satellite dishes, regardless whether the regulations "impair" DBS service at all, and regardless whether those regulations substantially affect interstate commerce at all. Indeed, the Preemption Rule would foreclose state and local governments from "exercising their own judgment in an area to which [they] lay claim by right of history and expertise, and it does so by regulating an activity beyond

---

[19] Hess v. Port Authority Trans-Hudson Corporation, 512 U.S. ___, ___, 115 S.Ct. 394, 402 (1994).

[20] FERC v. Mississippi, 456 U.S. 742, 768, n. 30, 102 S.Ct. 2126, 2142 n. 30 (1982). See also City of Edmonds v. Oxford House, Inc., 115 S.Ct. 1776, 1786 (1995) (Thomas, Scalia, and Kennedy, JJ., dissenting), and the cases cited therein.

the realm of commerce in the ordinary and usual sense of that term."[21] These are precisely the results that the Lopez court determined were unacceptable.

There can be no doubt that the Preemption Rule would require the Commission to become a national board of zoning appeals exercising quintessential police power functions. Section (b) of the Rule immediately invalidates thousands of local regulations in any way "affecting" small dishes. As a substitute for the local regulations it emasculates, the Rule substitutes Commission determinations, on a case-by-case basis, concerning whether relief from the conclusive presumption of Section (b) is warranted by "peculiar or unique situations."[22] Moreover, the Preemption Rule necessarily requires the Commission to engage in evaluating local "health, safety and aesthetic objectives" for each local jurisdiction that petitions the Commission. Indeed, the Preemption Rule makes local health, safety and aesthetics objections the only relevant issues of Commission inquiry. Incredibly, evidence concerning whether the local requirement at issue actually impairs DBS reception -- the only relevant statutory inquiry -- is apparently irrelevant to the Commission's inquiry in such petitions.

Thus, the Preemption Rule inherently requires the Commission to engage in the exercise of local police power. As Lopez teaches, that is beyond the scope of Congress' Commerce power under the Constitution. Certainly, if Congress cannot exercise such power, neither can the Commission.

---

[21] Lopez, 115 S.Ct. 1641 (Kennedy and O'Connor, JJ., concurring).

[22] Order at ¶ 51.

II. The Order's Sweeping Preemption of State and Local Rules Covering Satellite Dishes Is Arbitrary and Capricious and Contradicted by the Record.

Aside from the Preemption Order's constitutional and statutory infirmities, it is also arbitrary and capricious. The Order provides no logical basis, much less adequate record support, for its instantaneous and across-the-board invalidation of all local regulations "affect[ing]" small satellite dishes. Indeed, the Order all but concedes as much.[23] The Order mentions less than a dozen examples of local jurisdictions that it believes have regulations that impair the fulfillment of the Commission's articulated federal interest. When considered in light of the fact that there are more than 38,000 cities, towns, and counties nationwide, the admittedly anecdotal evidence cited in the Order is hardly evidence of a "national problem." (Order at ¶ 23). To the contrary, this dearth of evidence suggests that the only rational way to proceed would be to restate the statutory standard in the regulation and allow injured parties to challenge particular local regulations on a case-by-case basis before the Commission.[24]

---

[23] Specifically, paragraph 23 of the Order states:

> We acknowledge that there are numerous local jurisdictions in this country and that our evidence relates to only a small percentage of them. However, we find that this evidence establishes the existence of a national problem.

The Order then proceeds to try to bridge this gap in logic through the bootstrap assertion that local governments have failed to show that restrictive regulations do not exist. Id. But that is no reasoned basis for blanket invalidation of all regulations "affect[ing]" small dishes. Rather, the anecdotal nature of the problem counsels against such a sweeping approach and instead for case-by-case preemption.

[24] Curiously, and inconsistently, this is exactly what the FNPRM proposes with regard to non-governmental restrictions.

In fact, the record before the Commission shows no "national problem" of sufficiently widespread scope to justify the immediate voiding of the laws of literally thousands of local governments that the Order would require. Viewed, as it must be, from a national perspective, the record shows that there are more than 4 million satellite dishes in the nation (Order at ¶ 14). And far from being "impaired," DBS service is growing by leaps and bounds, securing roughly three million subscribers in just the two years of its existence; and DBS is expected to grow to 13-16 million subscribers by the year 2000.[25] DBS' unquestioned and unprecedentedly rapid growth, coupled with the at best anecdotal evidence about restrictions, actually proves the opposite of what the Order concludes: local regulations have not impaired DBS growth to any measurable degree at all. It also renders the blanket invalidation approach of the Preemption Rule totally arbitrary and capricious.[26]

III. The Commission Has Not Adequately Considered the Practical Effects of its Revised Rule.

A. Health and Safety Issues.

The Preemption Rule exhibits an alarming, and unprecedented, lack of concern about what it concedes are legitimate health and safety objectives. This perverse, and we assume unintended, consequence is perhaps best illustrated by the sweeping and immediate invalidation of current health and safety regulations required by Section (b) of the Preemption Rule.

---

[25] See, e.g., "DBS Players: Sky's the Limit," Cable World, April 8, 1996, at 12.

[26] Since the Order was issued, industry representatives have conceded that "Zoning [restrictions] are not a problem now, but down the road they could be." "Mayors Dish Out Objections to Satellite-TV Zoning Ban," Washington Times, Apr. 3, 1996 at B12. In other words, the industry has misled the Commission into a preemptive strike not to correct a current problem, but to sweep local governments out of the way before their constituents realize that zoning control of their neighborhoods has been transferred to Washington.

Under Section (b), any local regulation "affecting" smaller dishes is immediately unenforceable, even if it is "necessary to accomplish a clearly defined health or safety objective." Thus, even if the inability to enforce such a regulation exposes the public to imminent health or safety hazards, Section (b) commands that promoting the proliferation of small dishes justifies exposing the public to such hazards unless or until the local government (i) amends its regulation to state the objective in the text (subsection (b)(2)(A)); (ii) further amends its regulation to single out small antennas for special treatment on its face (subsection (b)(2)(C)); and (iii) successfully petitions the Commission or a court for a declaration under subsection (b)(1). In the meantime, Section (b) mandates elevation of commercial DBS interests over and above what Section (b) itself concedes are "necessary" health and safety objectives.[27]

In many local jurisdictions, requirements relating to the installation or incorporation into homes and buildings of electrical devices are specified by reference to the National Electrical Code ("NEC").[28] The requirements of the NEC are of general application and thus do not qualify under subsection (b)(2)(C). Consequently, in order for local regulations referencing the NEC to be enforceable with respect to smaller dishes, local jurisdictions will be required to amend their codes so as to make the NEC explicitly applicable to satellite antennas. That, of

---

[27] With all due respect to the Commission, it has not to date exhibited an ability to consistently act quickly on matters brought before it. This lack of timely response, of course, will only exacerbate the public's exposure to health and safety risks that Section (b) of the Preemption Rule requires.

[28] See, e.g., the Municipal Code of Rehobeth Beach, Section 5-29.1. Preemption of state and local electrical and building codes in particular, and safety codes in general, is especially troubling since the Commission has long recognized the impropriety of preempting any part of such codes. See, e.g., In the Matter of Review of the Technical and Operational Requirements of Part 76, Cable Television, 102 F.C.C. 2d 1372, 1380, n. 12 (1986), where the Commission stated "We have never preempted in such areas of local concern, as studio capacities, electrical safety codes, or construction requirements."

course, defeats the purpose of incorporating the NEC by reference in the first instance. Yet, until the problem is rectified, any local regulations that are necessary to serve health and safety objectives, but do not contain the proper recitation of such health or safety objective, will be unenforceable, and will remain so until each local government successfully petitions the FCC.

In addition to preempting electrical codes, Section (b) of the Preemption Rule operates to preempt building code regulations regarding antenna placement and mounting, regulations regarding wind and snow loading, requirements for electrical bonding, grounding, wiring, and similar regulations, all of which are designed to protect public health and safety. (As an example of such codes, relevant provisions of the BOCA building code are attached.) Effective immediately, Section (b) allows any person to install a one-meter dish literally anywhere (or a two-meter antenna anywhere in a commercial or industrial district) without regard to any zoning, building, electrical or other regulations, including those having health and/or safety components. Moreover, the local jurisdiction is helpless to enforce any such regulation unless and until the Commission grants the jurisdiction a favorable ruling.

Although perhaps less apparent, the restrictions in Section (a) of the Preemption Rule pose similar problems. To qualify under subsection (a)(1), most local regulations will have to be amended to state "a clearly defined health, safety, or aesthetic objective" in their text. The Commission recognizes this outcome, but appears to have little appreciation for its magnitude. Order at ¶ 42. This represents an incredible shift of administrative burden on thousands of local governments nationwide. And until the amendments are in effect, what the Order concedes are

regulations that serve legitimate health, safety and aesthetic objectives will be vulnerable to challenge.[29]

B. Aesthetic Concerns.

The Order exhibits a cavalier disregard for aesthetic concerns. One-meter dishes are not unobtrusive -- they are over three feet in diameter. When Section (b) becomes effective, persons will be able to hang one-meter dishes anywhere they want in any way (and any color) they want -- off the facade of any historic building, on any lawn or park, or even any sidewalk or street -- and local governments will be powerless to do anything about it.

The scope and effect of this preemption -- and its consequent effect on neighborhoods and communities across the nation -- is truly unprecedented. The Order seems completely unaware, for example, that there are approximately four thousand historic districts designated by local governments across the nation, and until or unless the consequent thousands of waiver petitions are successfully prosecuted, each of these areas is defenseless against placement of one-meter dishes anywhere within their environs.

According the National Association of Preservation Commissions, almost 4,000 historic districts have been designated by local governments around the country. These districts are subject to varying degrees of local government land use regulation by more than 2,000 historic preservation commissions, many of which have jurisdiction over more than one historic district.

---

[29] As pointed out in the attached petition of the Florida League of Cities, the rule would require each of Florida's 396 cities to petition and defend their building codes, many of which were amended based on the experience of Hurricane Andrew.

Within these historic districts, local government review and regulate demolition, new construction, and alterations to existing buildings -- a function essential to protecting the character and economic value of each historic district.[30]

Preemption of local historic preservation regulation is not necessary in order to accomplish the legislative goal of ensuring unimpaired access to services. Historic preservation regulation would not have the effect of banning reception devices, but rather, would simply allow local government review of the placement and appearance of such devices in order to minimize their adverse effect on the character of the historic district. Yet by adopting a presumption of unreasonableness, rather than limiting any preemption to those rare instances in which an irreconcilable conflict may be demonstrated, the Commission has imposed an unwarranted intrusion into local land use prerogatives.

While this problem is incredibly widespread, perhaps an example familiar to the Commission -- the City of Williamsburg, Virginia -- will prove the point. Responding to residents' desire to receive DBS service as an alternative to cable, as well as their desire to preserve the integrity of historic Williamsburg, last year the City amended its zoning laws to make it easier for residents to install DBS dishes of eighteen inches or less in diameter. (A copy of the new Williamsburg satellite zoning ordinance is attached.) The new Williamsburg satellite zoning ordinance allows satellite antennas having diameters of eighteen inches or less to be

---

[30] The Supreme Court has specifically upheld the legitimate police power authority of local governments to protect historic properties through the designation and regulation of landmarks and historic districts. These land use restrictions "enhance the quality of life" for all by "preserving structures and areas with special historic, architectural, or cultural significance." Penn Central Transportation Co. v. New York City, 438 U.S. 104, 128, 129 (1978).

installed in residential and commercial districts, in side or rear yard areas or attached to the side or rear wall or roof of a residence or building, provided that the antennas are not visible from the street or from the Colonial Williamsburg historic area. In the Williamsburg historic area, Architectural Board approval will still be required.

The rationale for the limitations on placement of the satellite antennas in Williamsburg is obvious -- to protect the unique character of the City and of the Colonial Williamsburg historic area. Yet, even this new law -- specifically designed to accommodate the desire of its residents to have access to DBS while protecting the unique character of the community -- does not meet the standards of Section (b), and thus would in large part be rendered unenforceable immediately.

To be sure, Williamsburg may seek a waiver of the Preemption Rule, but under Section (e) of the Rule, it is not entitled to a waiver; that is left to the Commission's discretion. And in the meantime, Williamsburg is powerless to prevent persons from hanging one meter dishes off of the front facades and on the grounds of every single building and home throughout historic Williamsburg. And this situation will occur across the nation in every community and every historic area.

IV. In Promulgating the Preemption Rule, The Commission Has Failed to Satisfy the Requirements of the Regulatory Flexibility Act.

The Regulatory Flexibility Act ("RFA"), 5 U.S.C. § 601 et seq., requires the Commission to prepare a final regulatory flexibility analysis that shall contain:

(1) a succinct statement of the need for, and objectives of the rule;

(2) a summary of the issues raised by the public comments in response to the initial regulatory flexibility analysis, a summary of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of these comments; and

(3) a description of each of the significant alternatives to the rule consistent with the stated objectives of applicable statutes and designed to minimize any significant economic impact of the rule on small entities which was considered by the agency, and a statement of the reasons why each one of such alternatives was rejected.[31]

The Commission's final regulatory flexibility analysis ("FRFA") with respect to the Preemption Rule was published in 61 Fed. Reg. at 10898 (March 18, 1996). That FRFA is inadequate and does not comply with the requirements of the RFA in that it ignores the substantial economic and administrative impact that the Rule will have on the more than 37,000 small local governments it will affect. In fact, the Preemption Rule would require virtually all of these small entities to amend their laws and to file petitions at the FCC in Washington. These issues were raised in the comments to the original notice of proposed rulemaking regarding the Preemption Rule and in the series of letters from municipalities listed at Appendix A to the Order, yet the Commission does not mention them in the FRFA.

The Commission also fails to provide a summary (as required by 5 U.S.C. § 604(a)(2)) of its assessment of these issues. Two possible conclusions can be drawn from the absence in

---

[31] See 5 U.S.C. § 604. The term "small entities" is defined at 5 U.S.C. § 601(6), and includes small governments of populations of less than 50,000. There are more than 37,000 such small governments.

the FRFA of the Commission's assessment of the economic and administrative repercussions from the application of the Preemption Rule to local jurisdictions: (i) the Commission did not adequately weigh these issues; or (ii) the Commission determined that the issues were of little or no consequence. Either conclusion would be surprising since the Commission expressly recognizes these issues in the Order at ¶ 42.

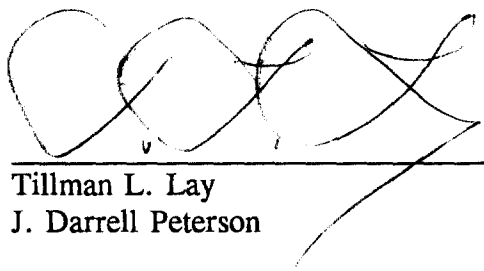
The Commission's failure to comply with the terms of the RFA by providing a summary of its assessment of all issues relevant to small entities prevents the Preemption Rule from becoming effective. 5 U.S.C. § 608(b). Before the Rule can become effective, the Commission must comply with the terms of the RFA and provide a final regulatory flexibility analysis that provides a summary of its assessment of all of the issues relevant to small entities.

V. Conclusion

The Commission should reconsider its Preemption Rule and instead adopt a rule more in line with Section 207. Such a rule would prohibit any state or local regulation that impairs a viewer's ability to receive video programming through devices designed for the reception of DBS service. Parties believing a particular regulation violates this rule should be allowed to petition the Commission for preemption, with the burden on the petitioning party to prove the regulation impairs its ability to receive DBS service, and the burden on the state or local government to prove that the challenged regulation serves a health, safety, or aesthetic objective

and is reasonably tailored to serve that objective.

Respectfully submitted,



Tillman L. Lay
J. Darrell Peterson

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.
1225 19th Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 785-0600

Attorneys for the Local Communities

April 17, 1996

BUILDING OFFICIALS & CODE ADMINISTRATORS INTERNATIONAL, INC.

4051 WEST FLOSSMOOR ROAD
COUNTRY CLUB HILLS, ILLINOIS 60478-5795

Telephone 708/799-2300
Facsimile 708/799-4981

April 17, 1996

TO: **Betty Ann Kane**

FROM: **Tom Frost**

SUBJECT: **Regulation of Satellite Antennas for Public Safety**

Attached please find the most directly applicable code requirements for satellite antennas. These sections are taken from the 1996 edition of the BOCA National Building Code.

The intent of the code is two fold; Section 3109.3.2 requires that external antennas, including "dish antennas" will safely resist imposed loads (wind and snow) and Section 3109.1 requires that the installation of antennas not damage the structure to which they are attached.

In my view, these requirements are essential to ensure the structural integrity of the applicable dish antenna installations. Absent such regulation, there will be no ability for state and local governments to protect their citizens from improperly installed antennas.

If you have any questions or if I can be of further assistance, please contact me at 708/799-2300, extension 325.

TF/jk
attachment